

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

JANUARY TERM, 1904.

No. 1395.

FRANZ J. HEIBERGER AND MARY W. HEIBERGER,
APPELLANTS,

vs.

AUGUSTUS S. WORTHINGTON, R. ROSS PERRY, SR., AND
FRANCIS P. B. SANDS.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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In the Court of Appeals of the District of Columbia.

FRANZ J. HEIBERGER ET AL., Appellants, }
vs. } No. 1395.
AUGUSTUS S. WORTHINGTON ET AL. }

a Supreme Court of the District of Columbia.

AUGUSTUS S. WORTHINGTON, R. ROSS PERRY, }
Sr., and Francis P. B. Sands, Plaintiffs, }
vs. } No. 46327. At Law.
FRANZ J. HEIBERGER and MARY W. HEI- }
berger, Defendants. }

UNITED STATES OF AMERICA, } ss:
District of Columbia, }

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:—

1 Declaration, &c.

Filed July 7, 1903.

In the Supreme Court of the District of Columbia.

AUGUSTUS S. WORTHINGTON, R. ROSS PERRY, }
Sr., and Francis P. B. Sands, Plaintiffs, }
vs. } No. 46327. At Law.
FRANZ J. HEIBERGER and MARY W. HEI- }
berger, Defendants. }

The plaintiffs sue the defendants for money payable to the plaintiffs for goods sold and delivered by the plaintiffs to the defendants; and for work done and materials provided by the plaintiffs for the defendants at their request; and for money lent by the plaintiffs to the defendants at their request: and for money received by the defendants for the use of the plaintiffs; and for money found to be due from the defendants to the plaintiffs on an account stated between them. And the plaintiffs claim the sum of one thousand,
1—1395A

five hundred dollars, with interest from the 29th day of June, 1903, according to the particulars of demand hereto annexed.

CHARLES L. FRAILEY,
Attorney for Plaintiffs.

The defendants are to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays occurring after the day of the service hereof; otherwise judgment.

CHARLES L. FRAILEY,
Attorney for Plaintiffs.

Particulars of Demand.

Filed July 7, 1903.

WASHINGTON, D. C., *June 29th*, 1903.

Franz J. Heiberger and Mary W. Heiberger to Augustus S. Worthington, R. Ross Perry, Sr., and Francis P. B. Sands, Dr.

Amount due for professional services in litigation in the supreme court of the District of Columbia involving the validity of the will of John W. Nairn, deceased, rendered said Franz J. Heiberger and Mary W. Heiberger under contract, dated May 31st, 1901, and agreed upon in an account stated between said Franz J. Heiberger and Mary W. Heiberger on the one hand and said Worthington, Perry and Sands on the other in the month of May, 1903, thirteen thousand, five hundred dollars \$13,500.00

CREDIT.

By cash paid by the defendants to plaintiffs under said account stated twelve thousand dollars.....	12,000.00
	\$1,500.00

with interest from the twenty-ninth day of June, 1903.

Filed July 7, 1903.

In the Supreme Court of the District of Columbia.

AUGUSTUS S. WORTHINGTON ET AL.

vs.

FRANZ J. HEIBERGER ET AL.

} No. 46327. At Law.

DISTRICT OF COLUMBIA, ss:

I, Harry H. Hollander, a notary public in and for the District aforesaid do hereby certify that on this 29th day of June, A. D. 1903,

Augustus S. Worthington, R. Ross Perry Sr. and Francis P. B. Sands personally appeared before me in the said District, and having been duly sworn, depose as follows:—

We are the plaintiffs in the above entitled cause and are all members of the bar of the supreme court of the District of Columbia, and were such members at the time of the transactions hereinafter referred to. That prior to the 31st day of May, 1901, there had been filed in the office of the register of wills for the said District a paper writing purporting to be the last will and testament of John W. Nairn, then deceased, and that a caveat to the probate of the said paper writing as such last will and testament was proposed to be filed by Mary W. Heiberger, a daughter of the said decedent, whose husband then was and is Franz J. Heiberger, the said Mary W. Heiberger and her said husband being the parties defendant in the above entitled suit. That on said day, the said Augustus S. Worthington, R. Ross Perry Sr. and Francis P. B. Sands were retained by the said defendants as counsel for the said Mary W. Heiberger and in her behalf to file a caveat to the probate of the said will

4 and to take such other steps as in the said contract are specified, all of which will appear from a copy of the said contract filed herewith and prayed to be taken as a part hereof. That thereafter the said caveat was filed and an issue framed thereupon, which issue came on for trial in the said court. That after the said trial had lasted for about four weeks, and a great number of witnesses had been examined in behalf of the caveator, Mary W. Heiberger, a compromise was agreed upon in consequence whereof the said Mary W. Heiberger received an interest in the estate of John W. Nairn aforesaid, the market value of which interest is not less than \$90,000. and which, in the month of April, 1903, was stated to the said defendants and was accepted by them as the market value of the interest of the said Mary W. Heiberger. That it was then further agreed upon between the plaintiffs on the one hand and the defendants on the other hand that the compensation to to be paid by the defendants to the plaintiffs in the premises under the provisions of said contract amounted to the sum of \$13,500.00, which was computed as fifteen per cent. of said sum of \$90,000.00. That the defendants accepted the said sum of \$13,500.00 as the amount due the plaintiffs under the said contract and that thereafter during the month of June, 1903, they paid the plaintiffs the sum of \$12,000.00 on account of said sum of \$13,500.00, leaving a balance due the plaintiffs upon said account of \$1,500.00. That thereafter, to wit, on the 29th day of June, 1903, a formal demand was made by the plaintiffs upon the defendants for the payment of said balance, but that the said defendants have not hitherto paid

5 the same, or any part thereof, and said sum of \$1,500.00 is due to the plaintiffs, exclusive of all set offs and just grounds of defense, with interest from the 29th day of June, 1903, besides costs of suit.

F. P. B. SANDS.

AUGUSTUS S. WORTHINGTON.
R. ROSS PERRY, SR.

Subscribed and sworn to before me, this 29th day of June, A. D., 1903.

[SEAL.]

HARRY H. HOLLANDER,
Notary Public, D. C.

6 This agreement made and entered into this 31st day of May, 1901, by and between Franz J. Heiberger and Mary W. Heiberger of the first part and A. S. Worthington, R. Ross Perry Sr. and F. P. B. Sands, attorneys at law, of the second part, all of the city of Washington, D. C. Witnesseth that the parties of the first part do hereby retain and employ the professional services of the said parties of the second part as such attorneys at law to contest in the name of the said Mary W. Heiberger the last will and testament of her father, the late John W. Nairn, until final decree or judgment in such proceedings as they shall institute for that purpose. And in consideration for said services the said parties of the first part agree to pay the following fees to be equally divided between said parties of the second part, to wit, a retainer of seven hundred and fifty dollars in consideration of which the said attorneys will as promptly as possible begin the proper proceedings in court to annul and set aside the said will; further, the said parties of the first part hereby agree to pay the costs of suit in the event of the failure of the contest, and in case a compromise is agreed upon before trial the said Mary W. Heiberger agrees and promises to pay to said parties of the second part a sum equal to five per centum of the market value of the interest in her said father's estate that will be received by her thereunder.

In the event of trial in court the said parties of the first part agree to pay unto the said parties of the second part a sum not to exceed \$5,000.00 to be paid, fifteen hundred dollars at the close of the case in the lower court; fifteen hundred dollars upon
7 close of the argument in the Court of Appeals, in case of an appeal to that court; and the remainder of said sum upon the close of the argument in the Supreme Court of the United States should the case be carried up to that tribunal; these last mentioned payments to be credited in proper proportions upon the payments to be made in case of final success in contesting the said will.

It is further agreed that in event of final success in the lower court a fee contingent upon such success is to be paid to said parties of the second part to be divided equally between them, of a sum equal to from ten to fifteen per centum of the market value of the interest of said Mary W. Heiberger in the estate of said John W. Nairn, deceased, upon the setting aside of said will. But should an appeal be taken to the Court of Appeals, and final success is secured in that court then the said contingent fee is to be a sum equal to from 12½ to 17½ per centum of the market value of said interest; but in the event of an appeal to the Supreme Court of the United States, the fee upon final success is to be a sum equal to from 15 to 20 per centum of said interest.

In witness whereof we have hereunto set our hands and seals this 31st day of May, 1901.

MARY W. HEIBERGER. [SEAL.]
FRANZ J. HEIBERGER. [SEAL.]

8

Plea.

Filed July 31, 1903.

In the Supreme Court of the District of Columbia.

AUGUSTUS S. WORTHINGTON ET AL., Plaintiffs,	} No. 46327. At Law.
vs. FRANZ J. HEIBERGER ET AL., Defendants.	

For a plea in this behalf, the defendants, Franz J. Heiberger and Mary W. Heiberger, say, by their attorneys, as to all the counts contained in the declaration herein filed, and as to all the several supposed promises in the said declaration mentioned, that they did not promise in manner and form as the plaintiffs in their declaration have alleged.

And, as a further plea in this behalf, the defendants say that the plaintiffs, at the commencement of the suit were, and still are, indebted to the defendants in the sum of four thousand seven hundred and fifty (\$4,750) dollars, as appears by the particulars of demand of said indebtedness hereunto annexed; and the defendants are willing that said sum may be set-off against the demand of the plaintiffs.

IRWIN B. LINTON,
J. ALTHEUS JOHNSON,
Attorneys for Defendants.

9

Affidavit.

Filed July 31, 1903.

DISTRICT OF COLUMBIA, ss:

Franz J. Heiberger and Mary W. Heiberger, having been duly sworn, depose and say, respectively, as follows: I am one of the defendants in the above entitled cause, and with my co-defendant have joined in a plea denying any liability to the plaintiffs in the premises. The demands of the plaintiffs referred to in the declaration grow out of and are based upon the services rendered by them as attorneys-at-law retained to represent the defendant Mary W. Heiberger in the matter of the contest of the last will and testament of the late John W. Nairn, of the District of Columbia. The retaining agreement made between the defendants herein and the plaintiffs

provided that the plaintiffs in the event of final success in the lower court (the supreme court of the District of Columbia), should be paid a fee, contingent upon such success, the fee to be equally divided among the plaintiffs, and to consist of a sum equal to from ten to fifteen per centum of the market value of the interest of the defendant, Mary W. Heiberger, as established in the estate of the deceased John W. Nairn, upon the setting aside of the will of the said Nairn. While the contest over the said will was under trial in the supreme court of the District of Columbia, a compromise agreement among all the parties in interest was effected, with the knowledge, consent, approval and active coöperation of the plaintiffs, and in said agreement the value of the property left by said John W. Nairn, to be divided among the parties to said agreement, was estimated to be of the value of six hundred thousand
 10 dollars (\$600,000), of which property thirteen and 8/24ths per cent., or eighty thousand (\$80,000.) dollars was to belong to the defendant, Mary W. Heiberger. The greater part of such proportion, to wit: all but fifteen thousand (\$15,000) dollars thereof, is to be withheld from the defendant Mary W. Heiberger and retained under the control and management of the National Safe Deposit Savings and Trust Company, of the District of Columbia, until the death or majority of Wilson Barker Nairn, the defendant Mary W. Heiberger in the meantime having only the income from her said property as managed by the said The National Safe Deposit Savings and Trust Company.

A fair, just and reasonable compensation for the services rendered by the plaintiffs in the matter aforesaid, would not exceed the lowest rate set forth in said agreement, to wit: ten per centum, the said agreement having fixed limits for the compensation of the plaintiffs at from ten to fifteen per centum of the interest acquired by the defendant, Mary W. Heiberger, in the estate of the deceased John W. Nairn.

The defendants have overpaid the plaintiffs, in the matter of the services aforesaid, having paid them the sum of twelve thousand, seven hundred and fifty (\$12,750) dollars to wit:

On June 8th, 1901.....	\$750.
" " 18th, 1903.....	11,250.
" " 29th, 1903.....	750.
	\$12,750.

each of said sums having been divided equally among the plaintiffs, the same being four thousand seven hundred and fifty (\$4,750.) dollars in excess of ten per centum of the estimated value of the interest acquired by the defendant Mary W. Heiberger,
 11 under the compromise agreement aforesaid, and seven hundred and fifty (\$750.) dollars in excess, even, of fifteen per centum of the estimated value of said interest. The said sums of

money, paid as aforesaid, are a full satisfaction and discharge of all sums of money due or payable to the plaintiffs by the defendants under the retaining contract entered into by the plaintiffs and these defendants, and for all services rendered by the plaintiffs in or about the contest over the will of the late John W. Nairn.

FRANZ J. HEIBERGER.
MARY W. HEIBERGER.

Subscribed and sworn to before me this 31st day of July A. D., 1903.

[SEAL.]

IRWIN H. LINTON,
Notary Public.

Particulars of Demand.

Filed July 31, 1903.

Reasonable compensation due plaintiffs under the retaining contract made between them and the defendants.

Ten per centum upon \$80,000.....	\$8,000.
Payments made, June 8, 1901.....	\$750.
" 18, 1903.....	11,250.
" 29, 1903.....	750.
	\$12,750.
Over payment.....	4,750.
	\$12,750.

12

Motion for Judgment.

Filed October 30, 1903.

In the Supreme Court of the District of Columbia.

AUGUSTUS S. WORTHINGTON ET AL., Plain-	} No. 46327. At Law.
tiffs,	
vs.	
FRANZ J. HEIBERGER ET AL., Defendants.	

Now come the plaintiffs by their counsel and move the court to enter judgment, in the above entitled cause, against the defendants for want of a sufficient affidavit of defense as required by the seventy-third rule of this court.

CHARLES L. FRAILEY,
Attorney for Plaintiffs.

Messrs. Irwin B. Linton and J. Altheus Johnson, attorneys at law.

GENTLEMEN: Take notice that on Friday, the 6th day of November, 1903, at ten o'clock a. m., or as soon thereafter as counsel can be heard, I shall bring up for argument the foregoing motion before Mr. Justice Barnard, holding circuit court No. 1.

CHARLES L. FRAILEY,
Attorney for Plaintiffs.

Oct. 30 / 03.

Service acknowledged.

J. ALTHEUS JOHNSON.

13 Supreme Court of the District of Columbia.

FRIDAY, November 13, 1903.

Session resumed pursuant to adjournment, Mr. Justice Barnard, presiding.

* * * * *

AUGUSTUS S. WORTHINGTON, R. ROSS PERRY,
Sr., and Francis P. B. Sands, Plaintiffs,

vs.

FRANZ J. HEIBERGER and MARY W. HEI-
berger, Defendants:

At Law. No. 46327.

Upon hearing the plaintiffs' motion for judgment against the defendants for want of a sufficient affidavit of defense, it is considered that said motion be, and hereby is, granted: Therefore it is considered that the plaintiffs recover against the defendants the sum of fifteen hundred dollars (\$1500), with interest thereon from the 29th day of June, 1903, being the money payable by said defendants to the plaintiffs by reason of the premises, together with their costs of suit to be taxed by the clerk, and have execution thereof, against the defendant Franz J. Heiberger, and against the sole and separate estate of the defendant Mary W. Heiberger.

The defendants note an appeal to the Court of Appeals, and the penalty of the bond on such appeal to operate as a supersedeas, is fixed at \$2500.00.

Memorandum.

December 7, 1903.—Appeal bond filed.

14

Order for Transcript.

Filed December 7, 1903.

In the Supreme Court of the District of Columbia, the — Day of
—, 190—.

AUGUSTUS S. WORTHINGTON ET AL.	}	At Law. No. 46327.
vs.		
FRANZ J. HEIBERGER ET AL.		

The clerk of said court will make the transcript herein for the Court of Appeals of the District of Columbia, and he will put into the transcript so made the declaration and the accompanying affidavit, the pleas and the supporting affidavits, the motion for judgment under the 73rd. rule and the action of the court on the said motion.

J. ALTHEUS JOHNSON,
Attorney for Appellants.

15

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, }
District of Columbia, } ss :

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 14, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this record, in cause No. 46327, at law, wherein Augustus S. Worthington *et al.* are plaintiffs, and Franz J. Heiberger *et al.* are defendants, as the same remains upon the files and of record in said court.

In testimony whereof, I hereunto subscribe
Seal Supreme Court my name and affix the seal of said court, at
of the District of the city of Washington, in said District, this
Columbia. 12th day of January, A. D. 1904.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1395. Franz J. Heiberger *et al.*, appellants, vs. Augustus S. Worthington *et al.* Court of Appeals, District of Columbia. Filed Jan. 15, 1904. Henry W. Hodges, clerk.

MAR 16 1904

Henry W. Haddock
for the Appellants

In the Court of Appeals of the District of Columbia.

FRANZ J. HEIBERGER,
AND
MARY W. HEIBERGER,
Appellants.

vs.

AUGUSTUS S. WORTHINGTON,
R. ROSS PERRY, SR.,
AND
FRANCIS P. B. SANDS.

No. 1395.

BRIEF IN BEHALF OF APPELLANTS.

IRWIN B. LINTON,
J. ALTHEUS JOHNSON,
For the Appellants

In the Court of Appeals of the District of Columbia.

FRANZ J. HEIBERGER
AND
MARY W. HEIBERGER,
Appellants.

vs.

AUGUSTUS S. WORTHINGTON,
R. ROSS PERRY, SR.,
AND
FRANCIS P. B. SANDS.

No. 1395.

BRIEF IN BEHALF OF APPELLANTS.

Statement of Case.

This case is here on appeal from the Supreme Court of the District of Columbia, that court having entered judgment against these appellants (the defendants in that court) on the ground that the affidavit of defense made by them, filed with their pleas in that court, was insufficient to prevent judgment going against them under the 73d common law rule of that court.

The declaration consisted merely of the common counts and demanded \$1,500.00. The Particulars of Demand showed that the plaintiffs (Augustus S. Worthington, R. Ross Perry and Francis P. B. Sands) claimed \$13,500.00 as their fee for professional services in the John W. Nairn

will contest of which amount they admitted the receipt from the defendants of \$12,000.00, thus leaving a balance of \$1,500.00 for which this suit was bought. The \$13,500.00 arose, it was stated, under a retaining contract made with the defendants May 31, 1901. This retaining agreement, referred to in the Particulars of Demand and to be seen at page 4 of the record, was so drawn as to meet the various stages of the will contest, whether settled by compromise or litigation, one provision of the agreement being as follows:-

“It is further agreed that in event of final success in the lower court a fee contingent upon such success is to be paid to said parties of the second part, to be divided equally between them, of a sum equal to from ten to fifteen per centum of the market value of the interest of said Mary W. Heiberger in the estate of said John W. Nairn, deceased, upon the setting aside of said will.”

The affidavit filed with the declaration showed that the amount of \$13,500.00, claimed as their fee by the plaintiffs, was reached by taking fifteen per centum of \$90,000.00 (Rec., p. 3), the latter being the amount which, in the affidavit, is said to be the market value of the interest received by the defendant Mary W. Heiberger in the estate of John W. Nairn (her father).

To the declaration the defendants interposed two pleas, one the general issue, the other a plea of set-off, as follows (Rec., p. 5) :

General Issue: “As to all the counts contained in the declaration herein filed, and as to all the several supposed promises in the said declaration

mentioned, the defendants say that they did not promise in manner and form as the plaintiffs in their declaration have alleged."

Set-Off: "As a further plea in this behalf, the defendants say that the plaintiffs, at the commencement of the suit, were, and still are, indebted to the defendants in the sum of four thousand seven hundred and fifty dollars (\$4,750.00), as appears by the particulars of demand of said indebtedness hereunto annexed; and the defendants are willing that said sum may be set off against the demands of the plaintiffs."

Along with these pleas was filed the affidavit of defense to be seen at pages 5 to 7 of the record. Common law rule 73 of the court below says that the plaintiff in an action ex contractu (provided he has himself gratified the rule with a proper affidavit) shall be entitled to a judgment for the amount he claims, "unless the defendant shall file, along with his plea, if in bar, an affidavit of defense denying the right of the plaintiff as to the whole or some specified part of his claim, and specifically stating also, in precise and distinct terms, the grounds of his defense, which must be such as would, if true, be sufficient to defeat the plaintiff's claim in whole or in part."

Notwithstanding the affidavit of defense above mentioned, which will be referred to more particularly hereafter, the court below entered judgment against the defendants for \$1,500.00, the full amount claimed by the plaintiffs in their declaration (Rec., p. 8).

Assignment of Errors.

The court erred in entering the judgment it did in this case:

First. Because the affidavit of defense, made by the appellants herein and filed with their pleas in the court below, stated facts, in precise and distinct terms, which, if true, were a bar to the claim set up by the plaintiffs in their declaration.

Second. Because the appellants, in the affidavit in support of their pleas in the court below, stated facts, the existence of which would effectually negative the demand made by the plaintiffs in their declaration.

Third. Because the whole tenor and effect of the affidavit supporting their pleas, made by these appellants, is inconsistent with the cause of action set up by the plaintiffs.

Fourth. Because the record shows that the judgment was improperly rendered. .

Argument for the Appellants.

Let us see what the affidavit of defense contains. In the first sentence of it the defendants say, respectively: "I am one of the defendants in the above entitled cause, and with my co-defendant have joined in a plea denying any liability to the plaintiffs in the premises."

And the defendants thereupon proceed to state the facts which, in their judgment, relieve them of liability. They say (and what could be more explicit, direct or pointed than the following averments?) Rec., pp. 5-6:

"The retaining agreement made between the defendants herein and the plaintiffs provided that the plaintiffs in the event of final success in the lower court (the

Supreme Court of the District of Columbia) should be paid a fee contingent upon such success, the fee to be equally divided among the plaintiffs, and to consist of a sum equal to from ten to fifteen per centum of the market value of the interest of the defendant Mary W. Heiberger, as established in the estate of the deceased John W. Nairn, upon the setting aside of the will of the said Nairn."

"While the contest over the said will was under trial in the Supreme Court of the District of Columbia, a compromise agreement among all the parties in interest was effected, with the knowledge, consent, approval and active co-operation of the plaintiffs, and in said agreement the value of the property left by said John W. Nairn, to be divided among the parties to said agreement, was estimated to be of the value of six hundred thousand dollars (\$600,000.00), of which property thirteen and eight twenty-fourths per cent., or eighty thousand dollars (\$80,000.00), was to belong to the defendant Mary W. Heiberger."

"The defendants have overpaid the plaintiffs, in the matter of the services aforesaid, having paid them the sum of twelve thousand seven hundred and fifty dollars (\$12,750.00), to wit:

On June 8th, 1901	\$ 750
On June 18th, 1903	11,250
On June 29th, 1903	750
	\$12,750

each of said sums having been divided equally among the plaintiffs, the same being four thousand, seven hundred

and fifty dollars (\$4,750.00) in excess of ten per centum of the estimated value of the interest acquired by the defendant Mary W. Heiberger under the compromise agreement aforesaid, and seven hundred and fifty dollars (\$750.00) in excess, even, of fifteen per centum of the estimated value of said interest."

"The said sums of money, paid as aforesaid, are a full satisfaction and discharge of all sums of money due or payable to the plaintiffs by the defendants under the retaining contract entered into by the plaintiffs and these defendants, and for all services rendered by the plaintiffs in or about the contest over the will of the late John W. Nairn."

Is it possible that the facts, averred as above in the affidavit of defense, constitute, if established in evidence, no bar to the claim herein set up by the plaintiffs? How could the defendants more completely and thoroughly deny further liability to the plaintiffs for services rendered in the Nairn will contest? What defense could be more decisive and conclusive than the one they have stated in their affidavit, to-wit, payment in full of all obligations connected with the matter upon which the claim is based and out of which it grows?

In the first part of their affidavit they say (Rec., p. 5):

"The demands of the plaintiffs referred to in the declaration grow out of and are based upon the services rendered by them as attorneys at law retained to represent the defendant Mary W. Heiberger in the matter of the contest of the last will and testament of the late John W. Nairn of the District of Columbia."

In the latter part of the affidavit, having in the meantime explained the situation and shown the payment of \$12,750.00, they say, as above quoted :

“The said sums of money, paid as aforesaid, are a full satisfaction and discharge of all sums of money *due or payable to the plaintiffs by the defendants under the retaining contract* entered into by the plaintiffs and these defendants, *and for all services rendered by the plaintiffs in or about the contest over the will of the late John W. Nairn.*”

Have the defendants not denied, *in toto*, the right of the plaintiffs to any further claim upon them, and have they not, in precise and distinct terms, stated the grounds of their defense, and would such defense, made good by proof, not defeat the claim set up by the plaintiffs?

As noticed above, the defendants, in their affidavit, make mention of a compromise agreement under which the will contest was settled and a valuation put upon the property according to which it was divided among the parties in interest, including the defendant Mary W. Heiberger. A certified copy of the decree ratifying the compromise settlement which the court below passed, in a proceeding instituted for the purpose, is printed as an appendix to this brief. The value of the property, and the interest to go to Mary W. Heiberger, as stated in that decree, are the same as stated in the affidavit of defense. (See Appendix hereto,, and particularly paragraphs 4 and 5, page IV ; and paragraphs 11 and 13, pages VI and VII). The personal property left by John W. Nairn was a negligible quantity, not affecting Mrs.

Heiberger. The part of his estate receivable by her was estimated to be worth \$80,000.00 as shown in the compromise agreement.

In the affidavit filed with the declaration, something is said by the plaintiffs about the defendants having agreed to a statement of account which showed \$13,500.00 to be due the plaintiffs under the provisions of the retaining contract (the \$13,500.00 being fifteen per cent. of \$90,000.00). They say (Rec. p. 3):

“That the defendants accepted the said sum of \$13,500.00 as the amount due the plaintiffs under the said contract and that thereafter during the month of June, 1903, they paid the plaintiffs the sum of \$12,000.00 on account of said sum of \$13,500.00, leaving a balance due the plaintiffs upon said account of \$1,500.00. That thereafter, to wit, on the 29th day of June, 1903, a formal demand was made by the plaintiffs upon the defendants for the payment of said balance, but that the said defendants have not hitherto paid the same, or any part thereof.”

Let us look at these statements in the light of what appears in the record. If the defendants in June admitted their liability for \$13,500.00 and paid \$12,000.00 of the amount, does it not seem a little queer that in the same month, on the very same day on which “a formal demand” is made for the remaining \$1,500.00, the plaintiffs should make, and verify by affidavit, their declaration in this case? True, the papers were withheld from the files of the court for a few days (until July 7, 1903), but they were withheld doubtless in the hope the defendants would relent in the attitude they had assumed at the time of the “formal demand made.” Look for a mo-

ment at what is stated by the defendants (Rec. p. 6). June 18, 1903, the defendants paid to the plaintiffs \$11,250.00 and that sum, with the \$750.00 paid two years before (June 8, 1901), makes \$12,000.00 (fifteen per cent. of \$80,000.00)—the maximum of the amount which they thought either demandable or payable under the retaining contract. But the plaintiffs stated an account for \$13,500.00.. That amount was not only fifteen per cent. of \$90,000.00, but it was oblivious of the \$750.00 which had first been paid to the plaintiffs. That \$750.00 is described in the retaining contract (Rec. p. 4) as “a retainer.” In June, 1903, that “retainer” was claimed by the plaintiffs, in their demand upon the defendants, to be a matter outside of the commission or percentage set forth in the contract. Evidently when the plaintiffs, upon their account stated, made “formal demand” on the defendants, the defendants, for the purpose of avoiding controversy, yielded to the extent of the \$750.00; for, on June 29, 1903, they paid another \$750.00, making fifteen per cent. of \$80,000.00, exclusive of the “retainer” paid in June, 1901; but it is also evident that the defendants gave the plaintiffs to understand that no further payments would be made on account of their services in the Nairn will contest, for on the very same day the papers for this suit were prepared, and verified by affidavit, though the filing of them was withheld for eight days.

If the plaintiffs, dissatisfied with the amount the defendants were willing to pay as demandable in the matter of the will contest, were to be at liberty to disregard that amount and sue for another, then (no definite agreement existing between them as to the exact amount due or payable) why not throw the whole thing into the contro-

versy? Since the plaintiffs have resorted to litigation for a settlement of the differences between them and the defendants, why not leave it to the court, with the help of a jury, to say what the amount is which is justly payable to the plaintiffs within the limits fixed by the retaining contract, to-wit, ten to fifteen per centum of the market value of the interest acquired by Mary W. Heiberger in the estate of John W. Nairn. So thought the defendants, and hence the following averment in the affidavit of defense (Rec., p. 6) :

“A fair, just and reasonable compensation for the services rendered by the plaintiffs in the matter aforesaid would not exceed the lowest rate set forth in said agreement, to wit, ten per centum, the said agreement having fixed limits for the compensation of the plaintiffs at from ten to fifteen per centum of the interest acquired by the defendant Mary W. Heiberger in the estate of the deceased John W. Nairn.”

If the plaintiffs and the defendants have never, within the limits mentioned, reached an agreement, then the question of the amount payable under the retaining contract is yet to be ascertained, and hence the plea in set off.

These remarks, throwing light upon the plea of set off, will show how utterly inconsistent the affidavit of defense is with any idea that the defendants ever “agreed” with the plaintiffs upon an “account stated” or “accepted the said sum of \$13,500.00 as the amount due the plaintiffs under the said contract.”

Whatever the plaintiffs may have seen fit to allege about the defendants having agreed upon \$13,500.00 in

an account stated, is, for the purposes of the 73d rule, overcome by the defendants, who state a condition of facts utterly irreconcilable with the notion that any such agreement was made by them. To play with words and try to say that the defendants, in their affidavit, have not, in express terms, denied such an agreement upon an account stated, is to show a total misconception of the meaning and purpose of the 73d rule, under which the affidavit was made. This court has frequently considered that rule, and it may be worth while to recall some of the things said by the court about that rule.

In *Lawrence vs. Hammond* (4 D. C. App., 467, 474):

“It must be borne in mind that, while the affidavit required of the plaintiff to entitle him to summary judgment under the rule, may be determined to be insufficient, the party is left to pursue his action in the regular way to trial and judgment, if he be entitled to it. But with the defendant the rule operates very differently. If his affidavit of defense be adjudged insufficient for any cause, judgment goes against him in favor of the plaintiff, and he is concluded, without trial, and without an opportunity to produce his evidence to refute the claim of the plaintiff, or to make good his defence to the action. It would seem but reasonable, therefore, that the rule, and the affidavit of defense required by it, should be liberally construed in favor of the party's right to make and maintain his defense. The object of the rule, as applied to the defendant, is supposed to be to prevent sham and fictitious defenses, to the hinderance and delay of justice. Therefore, when the affidavit is sufficient to satisfy the court of the good faith of the defendant in making his defense, great strictness ought not to be required.”

In *Bailey vs. D. C.* (4 D. C. App., 356, 370) :

“Nor should the affidavit (of defense), in any case, be tested as by a demurrer to a plea. All that can in reason be required is, that such state of facts, in support of the defense pleaded, be set forth in the affidavit as will satisfy the court of the good faith of the defendant in making the defense, and that such defense is not of a frivolous or dilatory character. Further than this the court can not go in restricting the defendant in the exercise of his right to contest the demand of the plaintiff.”

In *Strauss vs. Hensey* (7 D. C. App., 289, 294) :

“If the facts stated by the defendant, by any reasonable or fair construction, will constitute a defense to the action or claim of the plaintiff, within the scope of the pleas pleaded, it is the absolute constitutional right of the defendant to have that defense regularly tried and determined, in due course of judicial investigation. No rule, however beneficial it may be thought to be as a means of preventing the use of sham or feigned defenses, or desirable for the expedition of business, can deprive the defendant of this right. The facts stated in the defendant's affidavit the court is bound, for the purpose of securing to the defendant the right of trial, to assume as true, and that, too, *without reference to what the plaintiff may have stated in his affidavit.*”

In *Brown vs. Bank* (18 D. C. App., 598, 605) :

“Many cases have been determined by us on appeal, involving in one form and another the application of this rule; and, whilst the facts and circumstances of particular cases differ so that the

decision of one can not afford a certain rule for the determination of another, yet some principles have been well settled that have general application in all cases.

"The rule deprives a party of his ordinary right of jury trial and should be strictly interpreted as regards the affidavit of the plaintiff, and broadly and liberally construed as regards the counter affidavit of the defendant.

"The affidavit of defense is not the substitute for a special plea, and need not be drawn with such precision as to meet technical objections that might be urged; but, at the same time, it must allege facts indicating with reasonable distinctness and precision a substantial legal defense, and sufficient to satisfy the court of the good faith of the defendant.

"If there be nothing in the general statement of the facts of the defense to indicate or suggest evasion or studied uncertainty of allegation or denial in matters susceptible of clear and precise statement; and if it appear by any reasonable or fair construction that the facts so generally stated would constitute a defense to the plaintiff's action, in whole or in part, the constitutional right of trial by jury must be accorded."

The affidavit of defense in the case at bar sets forth the payment of \$12,750.00 and avers that such payment was

"a full satisfaction and discharge of all sums of money due or payable to the plaintiffs by the defendants under the retaining contract entered into by the plaintiffs and these defendants, and for all services rendered by the plaintiffs in or about the contest over the will of the late John W. Nairn."

The affidavit had previously declared that

"the demands of the plaintiffs referred to in the declaration grew out of and were based upon the

services rendered by them as attorneys at law retained to represent the defendant Mary W. Heiberger in the matter of the contest of the last will and testament of the late John W. Nairn of the District of Columbia."

The affidavit, without reference to a set off, states a defense which negatives the claim of \$1,500.00 set up by the plaintiffs over and above the sum of \$12,750.00 already paid. The determination of the plaintiffs to reach out with a grasping hand for an additional \$1,500.00, showing, in the light of the affidavit of defense, that the parties had not agreed upon the specific amount proper to be paid, has caused the defendants to recur from the point to which, in a complaisant and accommodating mood, they had advanced, and to return to the terms of the contract existing between them and the plaintiffs, a contract which calls for a commission of from ten to fifteen per cent. of the market value of the interest acquired by Mary W. Heiberger in the estate of her deceased father. But it is not material to this appeal to know the value of the services rendered by the plaintiffs, or whether ten per cent. of the interest received by Mrs. Heiberger would be a sufficient compensation for such services. It is enough for this appeal that the defendants, in the affidavit connected with their pleas, disclosed the grounds of a defense sufficient, if established, to defeat the claim of fifteen hundred dollars now set up in excess of the \$12,750.00 already paid for services in the Nairn will contest:

It is respectfully submitted that the judgment appealed from should be reversed.

IRWIN B. LINTON,
J. ALTHEUS JOHNSON,
For the Appellants.

APPENDIX TO BRIEF.

COPY OF DECREE OF COURT CONFIRMING
COMPROMISE IN NAIRN WILL CONTEST.

FILED MARCH 5, 1903, J. R. YOUNG, CLERK.

In the Supreme Court of the District of Columbia.

MARY W. HEIBERGER, JOHN J. NAIRN,
AND THOMAS S. NAIRN,
Complainants,

vs.

ADDIE NAIRN, WILSON BARKER NAIRN,
A MINOR, AND THOMAS R. JONES,
HIS GUARDIAN, GENEVRA E. NAIRN,
FRANZ J. HEIBERGER, CHILDRENS'
HOSPITAL OF THE DISTRICT OF
COLUMBIA, A BODY CORPORATE, AND
THE NATIONAL SAFE DEPOSIT, SAV-
INGS AND TRUST COMPANY OF THE
DISTRICT OF COLUMBIA, A BODY
CORPORATE,

Defendants.

IN EQUITY,

No. 23,791.

II

DECREE.

This cause came on to be heard at this term by consent of all the parties hereto upon the pleadings and proofs and was argued by counsel for the respective parties and submitted to the court, and upon consideration thereof, the court having given careful consideration to the will of John W. Nairn, of which exhibit "A" to the bill of complaint in this case is a copy, and it further appearing to the court that all the parties to this cause, except the defendant, The National Safe Deposit, Savings and Trust Company of the District of Columbia, in order to avoid long, uncertain, disagreeable and expensive litigation, have entered into and executed in good faith a written agreement of compromise in settlement of their respective claims and interests in respect of the estate of said John W. Nairn, a copy of said agreement being filed herein as exhibit "D" to the bill of complaint, and being as follows: AGREEMENT made this 4th day of March, 1903, by and between Mary W. Heiberger, John J. Nairn, Thomas S. Nairn, Addie Nairn, Wilson Barker Nairn by Thomas R. Jones, his guardian, Genevra E. Nairn, Franz J. Heiberger, and the Childrens' Hospital, a body corporate, witnesseth

WHEREAS John W. Nairn, the father of said Mary W. Heiberger, John J. Nairn, Thomas S. Nairn, Addie Nairn and Wilson B. Nairn, died in the City of Washington, in the District of Columbia, on the 20th day of May, 1901, leaving an instrument purporting to be his last will and testament, dated the 26th day of July, 1900, and which on the 22nd day of May, 1901, was filed in the Supreme Court of the District of Columbia, holding a Probate Term, where it still remains, and

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WHEREAS on the 2nd day of December, 1901, said Mary W. Heiberger filed a caveat to the said will, in consequence of which such proceedings were had in said court that there is now pending therein an issue as to the mental capacity of said John W. Nairn at the time said will was executed by him, and a trial of said issue is now in progress before a jury in said court, and

WHEREAS all the parties to this agreement are parties to said proceeding, and beneficiaries under said will and wish to avoid further litigation as to the validity of said instrument, and to enter into a family agreement and settlement by which all questions growing out of their respective interests in, to or against the estate of said John W. Nairn shall be amicably determined and put at rest,

IT IS, THEREFORE, HEREBY AGREED :

1st. That the provisions of said instrument, dated July 26th, 1900, numbered therein first, second and third, and relating to a piano and other personal property, shall be carried into full effect, except that the debts of said John W. Nairn and any lien on his real estate and the costs of administration shall be paid out of the real estate as hereinafter provided.

2nd. That the provisions of said instrument in favor of Thomas Gilbert Nairn and Hattie Louise Nairn and the children of said Mary W. Heiberger, all being grandchildren of said John W. Nairn, shall also stand and be carried into full effect, the annuities to the grandchildren to be paid out of the income of the real estate ; the other legacies to be paid out of the corpus thereof.

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3rd. That the expenses of the National Safe Deposit, Savings and Trust Company of the District of Columbia, the executor named in said instrument, incurred in the above-mentioned litigation, including reasonable compensation to the counsel for said executor in said litigation shall be paid by said executor out of said real estate.

4th. *That* THE ESTIMATED VALUE OF SAID REAL ESTATE *after deducting said expenses of litigation, debts and lien and the necessary expenses of the administration of the estate and after making allowance for the provisions of said instrument which it is above agreed shall be carried into full effect,* IS SIX HUNDRED THOUSAND DOLLARS, *and that the same shall be divided among the parties hereto in the following manner:* TO MARY W. HEIBERGER $13\frac{3}{4}\%$ OR \$80,000.00; John J. Nairn $8\frac{1}{2}\%$ or \$52,250.00; Thomas S. Nairn $7\frac{1}{4}\%$ or \$42,250.00; Addie Nairn $23\frac{1}{4}\%$ or \$138,250.00; Wilson Barker Nairn $23\frac{1}{4}\%$ or \$138,250.00; Genevra E. Nairn 14% or \$84,000.00; the Childrens' Hospital $10\frac{3}{4}\%$ or \$65,000.00. And anything received by said Childrens' Hospital hereunder shall be held by it applicable to its purposes free from the restrictions of said instrument. And said respective interests shall be deemed to be vested and subject to conveyance and devise by said parties subject as to the estate of said Thomas S. Nairn and Wilson Barker Nairn to the provisions of the eighth and ninth paragraphs hereof.

5th. *That said estate, except as herein otherwise provided, shall remain under the control and management of said Trust Company until said Wilson Barker Nairn shall reach the age of twenty-one years, or in case he shall not*

live until that time until his death, *and that in the meantime the net income of said estate shall be paid to the parties hereto at least quarterly in the following proportions:* MARY W. HEIBERGER $13\frac{8}{24}\%$; John J. Nairn $8\frac{17}{24}\%$; Thomas S. Nairn $7\frac{1}{24}\%$; Addie Nairn $30\frac{1}{24}\%$; Genevra E. Nairn $30\frac{1}{24}\%$; Children' Hospital $10\frac{20}{24}\%$. If said Genevra E. Nairn shall remarry before said Wilson B. Nairn becomes of age $15\frac{1}{8}\%$ of said income shall thereafter be paid to her and $15\frac{1}{8}\%$ to him or his guardian. If she shall die before he becomes of age he shall receive $30\frac{1}{24}\%$ of said income.

6th. That within a reasonable time after said Wilson Barker Nairn shall attain the age of twenty-one years, or within a reasonable period after his death, if he shall die before that time, said Trust Company shall convert said estate into cash and distribute or apply the proceeds thereof among the parties hereto in the proportions provided for in the fourth paragraph of this agreement, subject to the provisions of the eighth and ninth paragraphs hereof.

7th. All payments heretofore made by said Trust Company to any of the parties hereto out of the net income of said estate shall be charged to said parties, respectively, as though paid under this agreement, and they shall be credited with their said proportion of income from the death of said John W. Nairn, as though collected under this agreement.

8th. When said Wilson Barker Nairn arrives at the age of twenty-one years, but one-fourth of his said proportion of said estate shall be paid to him, and when he arrives at the age of twenty-five years another one-fourth thereof shall be paid to him, and when he arrives at the

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age of thirty years the remainder shall be paid him. But after he becomes twenty-one years of age the net income of the whole of his share shall be paid to him quarterly. If said Wilson Barker Nairn should die under the age of twenty-one years, his share and interest shall become vested in his mother, Genevra E. Nairn, if she survives him, and shall be payable to her forthwith, otherwise it shall go forthwith as the law directs.

9th. The distributive share of said Thomas S. Nairn in said estate shall continue to be held and managed by said Trust Company and the net income thereof paid to said Thomas S. Nairn during his life. Upon the death of said Thomas S. Nairn the fund so held for his benefit shall be paid over to such of his issue as shall survive him, to be divided among them per stirpes, and if none of his issue shall survive him the same shall be paid to his heirs, executors or administrators.

10th. That said National Safe Deposit, Savings and Trust Company of the District of Columbia, shall have the right to sell at any time so much of said real estate as may be necessary for the purpose of raising a fund to pay said expenses, lien and debts and the legacies to the grandchildren of said John W. Nairn, when they become due. It shall also have the power to sell any of said real estate and to reinvest the proceeds from time to time whenever it shall deem it to the best interests of the estate to do so.

11th. If said Mary W. Heiberger shall so elect within two months from the date of the decree confirming this agreement, she shall be entitled to receive from said Trust Company a sum not exceeding fifteen thousand

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dollars as an advance on her share of said estate, and said Trust Company may advance the sum to her on the security of her interest in the estate, or may sell sufficient real estate to raise said sum, and in either case said Mary W. Heiberger shall be charged with interest at the rate of five per centum per annum on the sum so received by her, the same to be credited to the income of the estate, and at the period of distribution the amount so advanced to her shall be deducted.

12th. Any sale of real estate made by said Trust Company shall be without liability on the part of the purchaser to see to the application of the purchase money.

13th. The provisions for the parties hereto herein reserved and credited are in satisfaction and lieu of all the legacies and annuities of the respective parties under said will, said Franz J. Heiberger hereby waiving all his privileges and rights under said will.

14th. The house No. 913 H Street, Northwest, having been disposed of by said John W. Nairn, it is agreed that said National Safe Deposit, Savings and Trust Company of the District of Columbia shall not be required to purchase another house as provided in said will, but that the sum of ten thousand dollars shall be set aside and treated as a fund in lieu thereof and applied in satisfaction of the rights of the children of Mary W. Heiberger under said will.

15th. Said Geneva E. Nairn shall have the use of house No. 1338 Vermont Avenue till June 30th, 1903, and be charged no rent for her occupancy prior to that time.

16th. This agreement is made with the understanding of all the parties that so far as said Wilson Barker Nairn

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is concerned, he being under the age of twenty-one years, the agreement is subject to the approval of the Supreme Court of the District of Columbia sitting in equity, in a proper proceeding, and that, unless such approval shall be given within ten days from this date, this agreement shall be null and void and the litigation shall proceed as though this agreement had not been executed. But if this agreement is ratified by the court, then a verdict sustaining the said will shall be rendered, and said will shall be probated and recorded as a will of real and personal property.

IN TESTIMONY WHEREOF the parties hereto set their respective hands at the City of Washington, District of Columbia, this Fourth Day of March, 1903, and said Childrens' Hospital of the District of Columbia hereunto causes its seal to be affixed.

MARY W. HEIBERGER

JOHN J. NAIRN

THOMAS S. NAIRN

By A. S. WORTHINGTON

His Attorney in Fact.

ADDIE NAIRN

WILSON BARKER NAIRN

By THOMAS R. JONES

His Guardian.

GENEVRA E. NAIRN

FRANZ J. HEIBERGER

SEAL.

CHILDRENS' HOSPITAL
OF THE
DISTRICT OF COLUMBIA.
CHARTERED 1870.

CHILDRENS' HOSPITAL OF THE
DISTRICT OF COLUMBIA

By FREDERICK L. MOORE,
President.

IX

Test :

W. P. YOUNG,
Secretary.

And the court having also fully examined the stenographer's transcript which is filed with the depositions in this case of the evidence so far taken in the trial now pending in the Supreme Court of the District of Columbia, holding a Probate Term, of the issue of which exhibit "C" to said bill of complaint is a copy, and being fully satisfied that said compromise agreement in the nature of a family settlement is a just and proper one under all the circumstances of the case and one which is especially beneficial to the estate of the infant defendant, Wilson Barker Nairn, it is, this 5th day of March, 1903, adjudged, ordered and decreed, that said compromise agreement be, and it is hereby, confirmed; that the act of Thomas R. Jones, guardian of said infant defendant in signing in the name of said infant defendant said compromise agreement, be, and it is hereby, ratified; and that the said defendant, The National Safe Deposit, Savings and Trust Company of the District of Columbia and the other parties to this cause be, and they are hereby, authorized and directed to carry said agreement into effect.

JOB BARNARD,
Justice.

A True Copy

Test :- J. R. YOUNG,
Clerk.

By R. J. MEIGS, JR.,
Assistant Clerk.

[SEAL.]

Court of Appeals, District of Columbia

JANUARY TERM, 1904.

No. 1395.

FRANZ J. HEIBERGER AND MARY W. HEIBERGER,
APPELLANTS,

vs.

AUGUSTUS S. WORTHINGTON, R. ROSS PERRY, SR.,
AND FRANCIS P. B. SANDS.

BRIEF FOR APPELLEES.

This case comes before this court on appeal from a judgment of the supreme court of the District of Columbia, rendered in favor of the appellees for want of a sufficient affidavit of defense, as required by the seventy-third rule of that court.

The declaration consisted of the common counts (1, 2) and the pleas were, 1, the general issue of *non-assumpsit*, and, 2, set-off (5).

To the declaration was attached the particulars of demand, showing a balance due the plaintiffs of \$1,500 *upon an account stated* between them and the defendants.

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The facts in the case appear in the affidavit in support of the declaration, and in that of defense. They are now stated in brief.

1. *The affidavit in support of the declaration.*

The appellees, members of the bar, were on May 31, 1901, retained by the appellants to represent them in a certain contest over the will of one John W. Nairn, and in opposition to the will, such retainer and the conditions as to compensation and services being contained in a contract between the appellants and the appellees (3, 4). The appellees then took the steps necessary to inaugurate a contest and bring the case to trial, and during such trial a compromise was agreed upon by the parties in interest whereby the appellant Mary W. Heiberger received an interest in the estate of Mr. Nairn of the market value of not less than \$90,000 (3). Thereafter, in April, 1903, the appellants accepted this amount as the *market value* of this interest.

By the third paragraph of the contract for services (4) (the only paragraph applicable to this controversy) it was agreed that in the event of final success in the lower court a fee contingent upon such success should be paid to the appellees of a sum equal to from 10 to 15 per cent. of the *market value* of the interest of Mary W. Heiberger.

It was then, in April, 1903, when the appellants accepted the sum of \$90,000 as the market value of the interest of Mary W. Heiberger, further agreed upon between the appellants and the appellees that the compensation to be paid by the appellants to the appellees under the provisions of the retaining contract amounted to the sum of \$13,500, which was computed as 15 per cent. of the \$90,000 accepted by the appellants as the market value of Mary W. Heiberger's interest, as above mentioned. The appellants accepted this sum of \$13,500 as the amount due the appellees under the contract, and during the month of June, 1903, paid on ac-

count of this sum \$12,000, leaving a balance due the appellees of \$1,500, for which a formal demand was made upon the appellants on the 29th day of June, 1903, but which was not paid.

2. *The affidavit of defense.*

The appellants in their affidavit substantially agree with the foregoing statement with reference to the employment of the appellees, and recite the provision in the contract of employment with reference to the contingent compensation of from 10 to 15 per cent. of the market value of the interest of Mary W. Heiberger. They also set out the fact that a compromise agreement was reached by the parties in interest during the trial of the case involving the validity of the will of John W. Nairn. They also say that the value of the property left by Mr. Nairn was estimated in the compromise agreement to be of the value of \$600,000, of which $13\frac{3}{4}$ per cent., or \$80,000, was to belong to Mary W. Heiberger. They set out the manner in which that amount is to be held for the benefit of Mary W. Heiberger. They further state that a fair and just and reasonable compensation for the appellees' services would not exceed the lowest rate set out in the contract of employment above mentioned, or 10 per cent., and they then aver that they have overpaid the appellees and give the dates of the payments which they have made and which they say amount to \$4,750 in excess of 10 per cent. of the estimated value of Mary W. Heiberger's share of the estate of said John W. Nairn and \$750 in excess even of 15 per cent. thereof. In conclusion they say that these payments are in full satisfaction and discharge of all amounts due by reason of the above-mentioned contract for services (6, 7).

The particulars of demand setting up the supposed overpayment of \$4,750 are filed with the pleas (7).

The plaintiffs below moved for a judgment under the seventy-third rule for want of sufficient affidavit of defense, which motion was granted and judgment was entered for the plaintiffs below, from which the appellants take their appeal.

ARGUMENT.

The affidavit in support of the declaration alleges an agreement between the appellants and the appellees as to the exact amount due and payable to the latter under their contract of employment, and of the amount due and unpaid on said agreed sum, which allegations have not been denied, directly or indirectly, by the affidavit of defense.

A glance at the contract for services (4) shows in the third paragraph thereof that the contingent fee to be paid to the appellees was to be a sum equal to from 10 to 15 per cent. of the *market value* of the interest of the appellant Mary W. Heiberger in the estate of John W. Nairn. Referring to the affidavit in support of the declaration, it will be seen that the appellees state unqualifiedly and positively that the *market value* of Mary W. Heiberger's interest, which she received by reason of the compromise of the litigation over Mr. Nairn's will, was not less than \$90,000, and that that sum in the month of April, 1903, "was stated to the said defendants and was accepted by them as the market value of the interest of the said Mary W. Heiberger." This statement is not denied by the affidavit of defense or any part thereof. The appellants say that the value (not the market value) of Mr. Nairn's estate was estimated in the compromise agreement at \$600,000, and that Mary W. Heiberger's interest in that property would equal the value of \$80,000. Supposing this statement to be true, there is no denial of the allegation in the affidavit of the plaintiffs

below that the sum of \$90,000 was accepted by the appellants as the market value of Mary W. Heiberger's interest.

The appellees then state in their affidavit that the appellants *agreed* that the compensation to be paid by the appellants to the appellees under the provisions of the contract of employment amounted to the sum of \$13,500, which was computed as 15 per cent. of the sum of \$90,000, and that the "defendants accepted said sum of \$13,500 as the amount due the plaintiffs under said contract," &c. This statement of the agreement between the parties as to the amount due and payable to the appellees is not anywhere in the affidavit of defense denied even inferentially. All that is said upon the subject of compensation in that document is that "a fair, just and reasonable compensation for the services rendered by the plaintiffs in the matter aforesaid, would not exceed the lowest rate set forth in said agreement, to wit, ten per centum, the said agreement having fixed limits for the compensation of the plaintiffs at from ten to fifteen per centum of the interest acquired by the defendant, Mary W. Heiberger, in the estate of the deceased, John W. Nairn."

Admitting for the purposes of this case that the foregoing statement is true, it would not be any defense to the plaintiffs' claim, because, whatever may have been, or might be, a fair and reasonable compensation for services rendered, the defendants had agreed that the compensation payable to the plaintiffs should be computed upon a 15 per cent. basis, and that that equaled the sum of \$13,500, or 15 per cent. of the market value, or \$90,000.

It could hardly be said by any stretch of the imagination that a fair and reasonable compensation would be 10 per cent. is a denial of the fact that a compensation of 15 per cent. was agreed upon by the appellants and the appellees as set forth in the affidavit in support of the declaration. A distinct and positive denial of the agreement

alleged in the affidavit in support of the declaration is necessary.

There are several cases cited in the brief for the appellants which it is not necessary to comment upon, as a recent case in this court would seem to be decisive of the question in the case at bar.

This court, in the case of *Whiting vs. Davidge*, decided on the 19th day of January, 1904, and found on page 114 of vol. 32 of the Washington Law Reporter, said with reference to the affidavit of defense in that case which the court held was insufficient:

“In the affidavit of defense there is also another serious intimation—for it is no more than an intimation—that Davidge did not render the stipulated professional services required by the contract. And to this intimation the fact of the voluntary dismissal of the *Leiter* suit by the parties thereto shortly after the execution of the contract between Whiting and Davidge gives some degree of plausibility. But there is no distinct positive allegation or averment by the appellant that Davidge did not render the stipulated services. In the affidavit for the plaintiff it had been positively averred that he had rendered the services required by the contract; and it was incumbent on the defendant, if he would take issue with the plaintiff on that ground, to deny the rendition of such services. This he does not do. If there had been such failure of performance of service on the part of Davidge, it would have been easy for the defendant to have said so in plain language. He says it only by indirection. He says that, with little or no assistance from Davidge, with no attendance by him at any hearing of the cause, with no report from him of the progress of the cause, and with no opinion from him touching the expediency of intervention by Whiting in the suit, he personally settled the controversy himself in New York, apparently by the sale of his stock. Plainly this is no sufficient allegation that Davidge did not render the stipulated services. It is intimation and indirection and not allegation upon which an issue could be framed for a jury.”

In the case at bar, if there had been no such acceptance of the sum of \$90,000 as the market value of Mary W. Heiberger's interest in the estate of said John W. Nairn, and if there had been no agreement between them and the appellees that the compensation due the latter under the provisions of their contract of employment should be the sum of \$13,500 computed as 15 per cent. of the above-mentioned \$90,000, and if the appellants had not accepted the sum of \$13,500 as the amount due the appellees under the contract, all as alleged in the affidavit of the appellees in support of their declaration, it would, as this court said in the case above mentioned, "have been easy for the defendants to have said so in plain language." In this case, as has been above shown, the defendants below did not deny that such agreement was made, even by indirection.

A few words, in conclusion, concerning the agreement contained in the appendix to the appellants' brief may not be out of place.

Appellants have printed this agreement, although not a part of the record, seemingly in support of the allegation in their affidavit of defense that the "value of the property left by said John W. Nairn, to be divided among the parties to said agreement, was estimated to be of the value of six hundred thousand dollars (\$600,000), of which property thirteen and $\frac{3}{4}$ ths per cent., or eighty thousand dollars (\$80,000), was to belong to the defendant, Mary W. Heiberger."

Although this allegation, as has been already shown, is, in view of the positive, undenied agreement on a market value of \$90,000 by the appellants, alleged in the affidavit of the appellees, immaterial, yet it can be seen by a glance at the fourth paragraph of the agreement of compromise, set out in the appendix at page IV, that the above allegation in the affidavit of defense at once dwindles into complete insignificance.

For this fourth paragraph shows on its face that the "estimated value" was made purely for the purpose of arriving at and computing the *proportions* which the respective parties in interest were to take of the whole property. It will be observed that there is nothing said about the actual, real, or estimated *market value* of the estate, and also that each of the amounts resulting from a division of the \$600,000 into the various proportions comes out in an even number of dollars and no cents, starting with such an even number to be divided. This could hardly happen in the case of a real valuation, estimated though it might be. Any other figure from \$60,000 to \$6,000,000, so long as it could be so divided as to enable the parties to calculate their various proportionate parts in a percentage ratio, would have been equally efficacious. As soon as the proportions were arrived at they were used in the fifth paragraph (Appendix, pp. IV and V) as the basis upon which the net income of the estate was to be distributed.

Upon the whole case it is respectfully submitted that the affidavit of defense in this case is insufficient and that the judgment below should be affirmed.

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